

# МІЖНАРОДНЕ ПРАВО



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## KERCH STRAIT INCIDENT IN THE LIGHT OF UNCLOS

*The aim of the article is to give an international legal assessment to Kerch Strait incident of 25 November 2018. The article deals with such issues in detail: Description of events, Scope of the discussion, Rights of navigation in the Kerch Strait (Rights under UNCLOS and Rights under the 2003 Cooperation Agreement), Denunciation / Termination of the Agreement between Ukraine and Russian Federation on cooperation in the use of the Sea of Azov and the Strait of Kerch (2003), Other violations of UNCLOS and Conclusions.*

**Keywords:** Kerch Strait incident; internal waters; territorial sea; freedom of navigation; warships; UNCLOS; Agreement between Ukraine and the Russian Federation on cooperation in the use of the Sea of Azov and the Strait of Kerch (2003).

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### **Інцидент у Керченській протоці у світлі Конвенції ООН з морського права 1982 року**

*Стаття має за мету дати міжнародно-правову оцінку інциденту в Керченській протоці, що стався 25 листопада 2018 р.*

Зазначається, що Україна і Російська Федерація підписали у 2003 р. Договір про співробітництво у використанні Азовського моря і Керченської протоки, який встановлює, що кораблі обох держав мають право вільного проходу через Керченську протоку. Аналіз показує, що Російська Федерація порушила зазначений Договір, коли в односторонньому порядку затримала на два дні прохід українських кораблів через води, які ведуть до Керченської протоки. Ця затримка безсумнівно робить неможливою свободу навігації через протоку і таким чином порушує Договір про співробітництво 2003 р. На жаль, Договір про співробітництво 2003 р. не містить норм про обов'язкову процедуру розгляду спору між Україною та Росією.

Висловлюється думка, що Рішення Арбітражу у справі між Словенією та Хорватією про Піранську затоку від 29 червня 2017 р. свідчить, що припинення Договору про співробітництво 2003 р. навряд чи змінить правовий статус Азовського моря і Керченської протоки як внутрішніх вод України і Російської Федерації.

Наголошується, що перешкоджання з боку Російської Федерації проходу українських кораблів у 12-мильній зоні, яка прилягає до Керченської протоки, кваліфікується не лише як порушення Договору про співробітництво 2003 р., але також і як порушення Конвенції ООН з морського права 1982 р. До того ж обстріл і захоплення військових кораблів України під час Керченського інциденту прямо порушує статті 30 і 32 Конвенції ООН з морського права 1982 р.

Зазначається, що Україна, на жаль, не зможе скористатися процедурами обов'язкового врегулювання спорів, які передбачені Конвенцією ООН з морського права 1982 р., оскільки Російська Федерація під час ратифікації цієї Конвенції зробила на підставі статті 298 застереження про незастосування до себе процедур обов'язкового врегулювання спорів у випадку, коли такі спори стосуються військової діяльності.

Разом з тим висловлюється припущення, що Україна має можливість звернутися до інших механізмів правового захисту за межами статті 298 Конвенції ООН з морського права 1982 р., зокрема вдатися до контрзаходів щодо Російської Федерації і використати підтримку міжнародного співтовариства для покладення нових санкцій на Російську Федерацію.

**Ключові слова:** Інцидент у Керченській протоці; внутрішні води; територіальне море; свобода судноплавства; військові кораблі; Конвенція ООН з морського права 1982 р.; Договір між Україною та Російською Федерацією про співробітництво у використанні Азовського моря і Керченської протоки 2003 р.

### **Description of Events**

On 25 November 2018 three Ukrainian naval vessels attempted to pass from the Black Sea into the port of Mariupol located on the coast of the Azov sea through the Kerch Strait. During the incident (hereinafter referred to as the “Kerch Incident”) Russian Navy vessels attempted to hinder passage of Ukrainian naval vessels through the Kerch Strait. They first rammed and later fired upon and captured the Ukrainian vessels. Both sides accuse each other of grave breaches of international law based on conflicting reconstruction of the events.

According to Ukraine, on 23 November 2018 three Ukrainian vessels – the Gyurza-M-class artillery boats “Berdyansk” and “Nikopol” together with tugboat

“Yany Kapu” (hereinafter referred to as the “Ukrainian Navy vessels”) – left the Port of Odessa for the port of Mariupol. During the course of that day two Russian boats – naval vessel “Suzdalets” and a boat of the border service of the Federal Security Service (hereinafter referred to as the “FSB”) – started escorting the Ukrainian Navy Vessels along the coast of the Crimean Peninsula. At 21:07 the border service boat, which was escorting the Ukrainian Navy Vessels communicated to the latter the rules of passing through the Kerch Strait, thus according to Ukraine, confirming the possibility of passing. 23 minutes later the Russian side communicated that the area before the Kerch Strait is closed for navigation from 22:00 November 24 to 22:00 November 26 but offered no explanation. Ukrainian Navy checked the database of the coordinator of the NAVAREA-III geographic area (SPAIN) as well as the NAVTEX notice which revealed no such official restrictions for passing through the Kerch Strait. At 3:58 on 25 November the boat “Berdyansk” established radio connection with the Russian border post call sign Bereh 25 and control centers of the ports of Kerch and Kavkaz, informing them about the intention to cross the 12-mile zone and pass through the Kerch Strait. Berdyansk captain cited the 2003 Cooperation Agreement between Russia and Ukraine to support the passage and also told that they were ready to take a pilot on board, and that a notice about the passage through the Kerch Strait had been given four hours in advance. Bereh 25 confirmed that they had received the message. At 5:38: Berdyansk communicated to the border service boat of the FSB Velbot-354 that they would be passing the 12-mile zone at 6:00 and moving to pass the Kerch Strait at 8:00. Velbot-354 confirmed that they had received the message. At 6:08 Ukrainian Navy vessels entered the 12-mile zone preceding to the Kerch Strait.<sup>1</sup>

Reconstruction of the events by the Russian Federation is different in several aspects. Firstly, Russian Federation maintains that after the Ukrainian Navy vessels were informed about the rules of crossing the border of the Russian Federation and passing through the Kerch Strait, the Ukrainian vessels replied that they were not planning to cross the Kerch Strait. Secondly, it is emphasized that after captain of Berdyansk cited the 2003 Agreement to support the passage of Ukrainian vessels through the Kerch Strait he was informed that for the purposes of safety of navigation passage through the Kerch Strait may be exercised only upon receiving a permission and in accordance with the schedule approved by the captain of the Kerch Port. It was also communicated to the captain of Berdyansk that application for passing through the Kerch Strait has to be presented 48 hours, 24 hours and 4 hours in advance. Since those requirements were not satisfied, Ukrainian Navy Vessels were prohibited from passing through the Kerch Strait.<sup>2</sup> Lastly, it has to be emphasized that the 12-mile zone along the coast of the Crimean Peninsula is considered by the Russian Federation as its territorial sea while Ukraine refers to is

<sup>1</sup> <http://euromaidanpress.com/2018/12/07/ukraine-prosecutors-show-reconstruction-of-russian-attack-on-ukrainian-vessels-near-kerch-strait/>, [https://www.youtube.com/watch?v=JnU\\_F2LwHrI&feature=youtu.be](https://www.youtube.com/watch?v=JnU_F2LwHrI&feature=youtu.be)

<sup>2</sup> <http://www.fsb.ru/fsb/press/message/single.htm%21id%3D10438315%40fsbMessage.html>

as the “12-mile zone” based on its position that accession of the Republic of Crimea to the Russian Federation is illegal and that the Republic of Crimea de jure remains under the sovereignty of Ukraine. For the purposes of this Article this zone will be referred to as the “12-mile zone preceding the Kerch Strait”.

After Ukrainian Navy Vessels entered the 12-mile zone preceding the Kerch Strait Russian vessels started dangerous maneuvers aimed at preventing the passage. Ukrainian Navy Vessels were also requested by radio communication to leave the territorial sea of the Russian Federation. According to Ukraine, at this point Russian boats started pushing and ramming the Ukrainian Navy Vessels. While the Russian Federation maintain that Ukrainian Navy vessels became combat ready, with artillery uncovered and raised at an angle of 45 degrees towards the Russian vessels. The Ukrainian sailors managed to outmaneuver Russia’s attempt to ram Berdyansk. Instead, Russian vessels Don and Izumrud collided between themselves. According to Ukraine, at 8:40 the port control gives the Ukrainian Navy Vessels an anchorage place for standing in a line to pass the strait and 11:08 Ukrainian vessels arrive at this point. Russian version alleges that the Ukrainian ships were blocked in the anchorage by the maneuvers of the Russian ships. At 13:42 Kerch traffic control post informs that passage through the Kerch Strait is closed in both directions due to a tanker allegedly run aground under the bridge arch. Ukraine argues that his tanker has not been operated since 2016, does not have an ensign, and was supported by two Russian tugboats under the bridge arch.<sup>1</sup>

According to Ukraine, at 17:36 with the aim of avoiding the conflict Ukrainian vessels decided to turn back to Odesa. At 17:59 FSB border control boat “Don” issued an order for the Ukrainian Navy vessels to stop due to an alleged violation of the territorial waters of the Russian Federation. Russian Federation maintains that the Ukrainian ships did not respond to any contact and ignored the orders to stop. Therefore, they continued pursuit of the Ukrainian Navy Vessels (although the Russian Federation is silent on the fact alleged by Ukraine that 9 more naval ships joined the pursuit). According to the FSC of the Russian Federation, Ukrainian Navy Vessels were warned that in case they did not stop the Russian vessels would start firing the necessary shots. Since the Ukrainian Navy Vessels further ignored the orders, the Russian Federation states that after firing the warning shots its vessels opened fire on Berdyansk. In the aftermath 3 crew members of the Ukrainian Navy Vessels were injured, the vessels themselves and entire crew captured detained by the Russian Federation.<sup>2</sup>

It has to be noted that both sides do not agree on the exact location of the interception of Ukrainian Navy Vessels. The Russian Federation argues that this took place within its claimed territorial sea. While Ukraine maintains that firing took place outside the 12-mile zone preceding the Kerch Strait, i.e. international waters.<sup>3</sup>

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<sup>1</sup> *Supra* note 1 and 2.

<sup>2</sup> *Ibid.*

<sup>3</sup> Cruickshank M., Investigating The Kerch Strait Incident, <https://www.bellingcat.com/news/uk-and-europe/2018/11/30/investigating-the-kerch-strait-incident/>

### *Scope of the Discussion*

First of all, it is necessary to emphasize that Ukrainian ships were denied passage by Russian warships through the territorial sea along the coasts of Crimean Peninsula and Kerch-Yeni-Kale Channel which before 2014 had been administered and managed by Ukraine. Assuming that accession of the Republic of Crimea to the Russian Federation is illegal and that the Republic of Crimea *de jure* remains under the sovereignty of Ukraine, such actions of the Russian warships definitely violate the norms of international law. Firstly, such exercise of jurisdiction in the territory of another state undermines the cornerstones of international law—territoriality, sovereign equality, and non-intervention. Secondly, threatening to use force and firing upon the warships of another state in the latter's territorial sea is a clear violation of Article 51 of the UN Charter and qualifies as an act of aggression under Article 3 (c) and (d) of the Definition of the Aggression adopted by the General Assembly Resolution 3314 (XXIX). Thirdly, by doing so the Russian Federation has also acted in contravention of the provisions of the 1982 United Nations Convention on the Law of the Sea (hereinafter referred to as the “UNCLOS” or the “Convention”), which establish that the coastal state (in this case Ukraine) exercises sovereignty over its territorial sea and, consequently, no other state is permitted to exercise its jurisdiction within the territorial state of another state. Furthermore, the Russian Federation also failed to respect Article 301 of UNCLOS providing that “State Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations”.

Many states of the world have condemned the Russian actions namely based on the aforementioned violations of the international law. It would be advisable for Ukraine to seek redress before an international court or tribunal. However, “a distinct feature – and weakness – of public international law <...> is the lack of compulsory judicial system”<sup>1</sup>. Since the Russian Federation has not recognized the compulsory jurisdiction of the International Court of Justice, Ukraine can only institute proceedings under general or regional international treaty by which the Russian Federation has committed itself to submit the disputes arising out of the application or interpretation of such treaty to a judicial or arbitral body. UNCLOS with its outstanding feature of compulsory dispute settlement procedures entailing binding decisions would seem to be the best option.

However, if Ukraine purported to invoke compulsory dispute settlement procedures under UNCLOS based on the fact that the Russian Federation has acted unlawfully in the area which *de jure* is the territorial sea of Ukraine, it would be again faced with the objection of the Russian Federation that the “Tribunal lacks jurisdiction because the Parties’ dispute in reality concerns Ukraine’s “claim to sovereignty over Crimea” and is therefore not a “dispute concerning

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<sup>1</sup> Attard D. J. The IMLI Manual on International Maritime Law, Volume I: The Law. Oxford: Oxford University Press, 2014, p. 533.

the interpretation or application of the Convention” as required by Article 288, paragraph 1, of the Convention”<sup>1</sup>. It is true that Ukraine in its response to Russia’s objections has stated that “Russia has no plausible legal claim to sovereignty over Crimea”, therefore, “[t]he Tribunal <...> cannot recognize such a claim as a basis to defeat its jurisdiction (or otherwise)”<sup>2</sup>. However, some authors believe that “Ukraine is fighting an uphill jurisdictional battle here”<sup>3</sup>. Therefore, the purpose of this article is to examine whether in the context of Kerch Strait incident Ukraine could claim any other violations of UNCLOS, which would not be related to land sovereignty issues and, thus, could be submitted under UNCLOS to a compulsory dispute settlement procedure without facing objections from the Russian side to the court’s or tribunal’s jurisdiction. This article also aims to predict possible outcomes of alternative legal strategies that could be implemented by Ukraine for the purposes of securing its legitimate interests in the Sea of Azov and Kerch Strait.

Some authors believe that the Kerch Incident is part of an ongoing international armed conflict between Ukraine and Russian Federation. Therefore, it is argued that in such case “the law of naval warfare is *lex specialis* and supplants *mutatis mutandis* the peacetime rules of the international law of the sea for Russia and the Ukraine”<sup>4</sup>. However, since Russia disputes that an international armed conflict exists between it and Ukraine<sup>5</sup> and would be estopped from requiring to displace UNCLOS by the law of naval warfare, this article shall be only limited to analysis of the events of the Kerch Incident in the light of the peacetime rules, i.e. UNCLOS and any other applicable international treaties.

### ***Rights of Navigation in the Kerch Strait***

#### ***Rights under UNCLOS***

On 26 November 2018, the General Staff of the Ukrainian Armed Forces held a briefing where its Deputy Head Major General Radion Tymoshenko stated that the actions of the Russian Federation during the incident not only amounted to an act of armed aggression but also violated Article 38 of UNCLOS which guarantees the right of transit passage through all straits indicated in Article 37 of UNCLOS<sup>6</sup>. This implies that Ukraine believes that Kerch Strait qualifies as the strait referred to in Article 37 and, thus, the right of transit passage is applicable therein. The

<sup>1</sup> Procedural Order No. 3 regarding Bifurcation of the Proceedings, p. 2, *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait* (Ukraine v. the Russian Federation), <https://pcacases.com/web/sendAttach/2446>

<sup>2</sup> *Ibid.*

<sup>3</sup> Schatz V., Koval D. Insights from the Bifurcation Order in the Ukraine vs. Russia Arbitration under Annex VII of UNCLOS, <https://www.ejiltalk.org/insights-from-the-bifurcation-order-in-the-ukraine-vs-russia-arbitration-under-annex-vii-of-unclos/>

<sup>4</sup> Kraska J. The Kerch Strait Incident: Law of the Sea or Law of Naval Warfare?, <https://www.ejiltalk.org/the-kerch-strait-incident-law-of-the-sea-or-law-of-naval-warfare/>

<sup>5</sup> *Ibidem.*

<sup>6</sup> <http://www.mil.gov.ua/news/2018/11/26/normi-mizhnarodnogo-prava-ta-nacziionalnogo-zakonodavstva-dayut-pidstavi-klasifikuvati-dii-rf-yak-akt-zbrojnoi-agresii-%E2%80%93-general-major-radion-timoshenko/>



status of the Kerch Strait and legal regime applicable therein is discussed in more detail below.

Article 37 of UNCLOS provides that “this section [Section 2. Transit Passage] applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone”. It is generally accepted that two criteria have to be satisfied in order for the transit passage to be applicable in a strait under UNCLOS – a geographic and functional criterion. As regards the geographic criterion, the strait must lie between one part of an exclusive economic zone or the high seas and another part of an exclusive economic zone or the high seas. Functional criterion is a more complex one.<sup>1</sup>

Before proceeding with analysis of functional criterion, it shall be firstly determined whether the Kerch Strait satisfies the geographical one, i.e. whether it connects one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

Kerch Strait is situated between the Kerch Peninsula of the Crimea and the Taman Peninsula of the Kuban and joins the Black Sea and the Sea of Azov<sup>2</sup>. In the Black Sea the coastal states have established both their territorial seas and exclusive economic zones. Delimitation of the exclusive economic zones in the Black Sea is subject not only to numerous international treaties<sup>3</sup> but also the judgement of International Court of Justice<sup>4</sup>. Now it is necessary to determine whether there are any areas qualifying as the exclusive economic zone or high seas in the Sea of Azov.

Sea of Azov is bordered by two states – Ukraine and the Russian Federation. Although the sea is relatively small, its area would be sufficient for the coastal states to have both the territorial sea and the exclusive economic zone. However, in 2003 the states have signed two bilateral treaties both of which clearly establish that the Sea of Azov and the Kerch Strait are internal waters of the signatory states. Article 5 of the Agreement between the Russian Federation and Ukraine on the

<sup>1</sup> Kastner P. International Legal Dimensions of the Northern Sea Route in Keupp M. M. (ed.), The Northern Sea Route. A Comprehensive Analysis. Wiesbaden: Springer, Fachmedien, 2015, p. 43.

<sup>2</sup> <http://www.encyclopediaofukraine.com/display.asp?linkpath=pages%5CK%5CE%5CKerchStrait.htm>

<sup>3</sup> Agreement between the Republic of Turkey and the Republic of Bulgaria on the determination of the boundary in the mouth of the Rezovska/Mutludere River and delimitation of the maritime areas between the two states in the Black Sea, 4 December 1997, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TUR-BGR1997MB.PDF>, Exchange of Notes constituting an Agreement on the Delimitation of the USSR and Turkey Exclusive Economic Zone in the Black Sea, 23 December 1986 - 6 February 1987, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/RUS-TUR1987EZ.PDF>, Protocol between the Government of the Republic of Turkey and the Government of Georgia on the Confirmation of the Maritime Boundaries between them in the Black Sea, 14 July 1997, <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TUR-GEO1997BS.PDF>.

<sup>4</sup> Judgment of the International Court of Justice on the Case Concerning Maritime Delimitation in the Black Sea (Romania/Ukraine), 3 February 2009, <https://www.icj-cij.org/files/case-related/132/132-20090203-JUD-01-00-EN.pdf>

Ukrainian – Russian State Border signed on 28 January 2003 specifies that nothing in this agreement shall prejudice the position of the Russian Federation and Ukraine regarding the status of the Sea of Azov and the Kerch Strait as the internal waters of the two states<sup>1</sup>. On 24 December 2003 Ukraine and the Russian Federation signed the Agreement on Cooperation in the Use of the Sea of Azov and the Kerch Strait which in Article 1 established that historically the Sea of Azov and the Kerch Strait are internal waters of the Russian Federation and Ukraine<sup>2</sup>. Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch of 24 December 2003 was published in the Law of the Sea Bulletin No. 54<sup>3</sup>. In this statement the two states once more emphasized that “historically the Sea of Azov and the Strait of Kerch are inland waters of Ukraine and Russia”.

The analysis will further focus on whether international law permitted Ukraine and the Russian Federation bilaterally to agree that the Sea of Azov and the Kerch Strait are internal waters of the two states and, consequently, whether such agreement is binding upon other states. In order to answer this question, it is necessary to review the status the Sea of Azov and the Kerch Strait from a historical perspective.

As it is summarized by Alexander Skaridov, in 1700 the Treaty of Constantinople was signed between the Tsardom of Russia and the Ottoman Empire which gave Russia control over the Azov Sea. Thereafter, for almost 300 years this sea was among the quietest places of the World Ocean due to the fact that it was entirely situated within the territory of Imperial Russia and later the Union of Soviet Socialist Republics (hereinafter referred to as the “USSR”). During the Soviet period a straight baseline was drawn between Cape Kyz-Aul and Cape Geleznyi Rog leaving the entire Sea of Azov and the Kerch Strait on the landward side of the baselines. Thus, the Sea of Azov and the Kerch Strait were part of internal waters of the USSR.<sup>4</sup>

It has to be emphasized that from the international law perspective there were no “battles” among the differing scientists or claims over the Sea of Azov and the Kerch Strait from other states<sup>5</sup>. The straight baseline drawn between Cape Kyz-Aul and Cape Geleznyi Rog was subject to legal evaluation performed by the Bureau of Oceans and International Environmental and Scientific Affairs of the United

<sup>1</sup> Договор между Российской Федерацией и Украиной о Российско-Украинской государственной границе, [http://www.mid.ru/foreign\\_policy/international\\_contracts/2\\_contract/-/storage-viewer/bilateral/page-8/46278](http://www.mid.ru/foreign_policy/international_contracts/2_contract/-/storage-viewer/bilateral/page-8/46278)

<sup>2</sup> Договор между Российской Федерацией и Украиной о сотрудничестве в использовании Азовского моря и Керченского пролива, <http://faolex.fao.org/docs/texts/bi-45795.doc>

<sup>3</sup> Joint Statement by the President of Ukraine and the President of the Russian Federation on the Sea of Azov and the Strait of Kerch, 24 December 2003. Law of the Sea Bulletin No. 54, United Nations (New York, 2004), p. 131, [http://www.un.org/Depts/los/doalos\\_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf](http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletin54e.pdf)

<sup>4</sup> Skaridov A. The Sea of Azov and the Kerch Straits in Caron D. D. and Oral N. (eds.), Navigating Straits. Challenges for International Law, Leiden: Brill Nijhoff, 2014, p. 220-221.

<sup>5</sup> *Idib.*, p. 221.



States Department of State. After analysis of the straight baselines of the USSR in the Black Sea the United States concluded that only 9 of the 25 baselines segments were drawn in areas that meet the geographical criteria set forth in the UNCLOS and the baseline between Cape Kyz-Aul and Cape Geleznyi Rog was among those 9 segments<sup>1</sup>.

After Ukraine gained independence in 1991, the Sea of Azov became bordered by two states – Ukraine and Russian Federation. Under Article 7 of the 1958 Convention on the Territorial Sea and Contiguous Zone as well as Article 10 of UNCLOS straight baseline across the mouth of the bay could be drawn only if the coasts of the bay belong to a single State. The conventions do not incorporate any rules that would clarify the uncertainty over the closing of multi-state bays which “resulted in both a divergence of views among States, and the division of publicists on this issue”<sup>2</sup>.

Some publicists believe that the already quoted Article 7 of the 1958 Convention on the Territorial Sea and Contiguous Zone as well as Article 10 of UNCLOS mean that only the bays the coasts of which belong to a single State can be closed as internal waters by a straight baseline while the ordinary rule of the low-water line automatically applies to shared bays<sup>3</sup>. However, there are others who present a different view. As it is correctly indicated by Tullio Scovazzi, “should a bay closing line lawfully established by a coastal State be cancelled only because afterwards, due to changes in sovereignty on land, the same bay becomes bordered by two States? For instance, to consider a recent instance, should the line drawn by the former Yugoslavia to close the Bay of Piran – which is a juridical bay – be withdrawn because, after the territorial changes occurring in that country, the bay is shared today by two successor States (Croatia and Slovenia)? The more logical and simple response is a negative one”<sup>4</sup>.

The aforementioned controversy has been finally resolved by the Final Award of 29 June 2017 in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009 (hereinafter referred to as the “Award in the Slovenia / Croatia Arbitration”)<sup>5</sup>.

Slovenia argued that the Bay of Piran (hereinafter referred to as the “Bay”) constitutes Slovenia’s internal waters, either on the basis of it being a juridical bay or

<sup>1</sup> United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs. Limits in the Seas No. 109 “Continental Shelf Boundary: Turkey – U.S.S.R. and Straight Baselines: U.S.S.R. (Black Sea), p. 8-9, <https://www.state.gov/documents/organization/58383.pdf>

<sup>2</sup> Talaie F. The Issue of the Delimitation of Multi-State Bays in the International Law of the Sea, University of Tasmanian Law Review Vol 18 No 1 (1999), p. 22.

<sup>3</sup> Scovazzi T. Problems Relating to Drawing of Baselines to Close Shared Maritime Waters in Symmons C.R. (ed.), Selected Contemporary Issues in the Law of the Sea, Leiden: Martinus Nijhoff Publishers, 2011, p. 19.

<sup>4</sup> *Ibid.*, p. 21.

<sup>5</sup> Final Award of 29 June 2017 in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, signed on 4 November 2009, <https://pcases.com/web/sendAttach/2172>

an historical bay, thereby, seeking to invoke the principle of *uti possidetis*. According to Slovenia, prior to dissolution of the former Yugoslavia, the Bay enjoyed the status of a juridical bay consisting of internal waters. Croatia in its turn argued that despite the fact that the former Yugoslavia could have drawn a closing line across the Bay, it had never done that. Both states agreed that, as a result of the dissolution of the former Yugoslavia, the Bay had two coastal states, however, they differed on the effect of that dissolution on the status of the Bay. Slovenia argued that there had been no change in the Bay's status as internal waters. Croatia's principal contention was that it did not accept that the Bay had even been a juridical bay. Furthermore, it argued that even assuming that it was, the effect of the dissolution of the former Yugoslavia caused the Bay to be re-characterized as territorial waters.<sup>1</sup>

The Tribunal concluded that on the date of independence of Croatia and Slovenia, the Bay was Yugoslav internal waters<sup>2</sup>. Then it went to examine whether the dissolution of the former Yugoslavia had altered the status of the Bay. Referring to the Gulf of Fonseca case the Tribunal established that the Bay had been internal waters before the dissolution of the former Yugoslavia in 1991 and it remained so after that date<sup>3</sup>. It went on to state that "dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status"<sup>4</sup>. The Tribunal thus determined that the Bay remained internal waters with the pre-existing limits<sup>5</sup>. It then concluded that the delimitation of the internal waters within the Bay had to be made on the basis of *uti possidetis*, however, since there was no formal division of the Bay between the two Republics prior to dissolution of Yugoslavia, delimitation was made only on the basis of the *effectivités* at the date of independence<sup>6</sup>. Finally, the Tribunal concluded that there was no need for it to define any particular usage regime in the Bay different from what applies under international law<sup>7</sup>.

As it was already indicated, during the Soviet period the Sea of Azov and the Kerch Strait were part of the internal waters of the USSR. Having in mind that Ukraine and the Russian Federation are both successor states of the USSR<sup>8</sup> and following the reasoning of the Tribunal in the Award in the Slovenia / Croatia Arbitration, it has to be concluded that dissolution of the USSR did not have the effect of altering the status of the Sea of Azov and the Kerch Strait. Therefore, both agreements that were signed between Ukraine and the Russian Federation in 2003 –

<sup>1</sup> *Ibid.*, para 774, 785, 788-790.

<sup>2</sup> *Ibid.*, para 881.

<sup>3</sup> *Ibid.*, para 882-883.

<sup>4</sup> *Ibid.*, para 883.

<sup>5</sup> *Ibid.*, para 885.

<sup>6</sup> *Ibid.*, para 886-888.

<sup>7</sup> *Ibid.*, para 914.

<sup>8</sup> Закон України "Про правонаступництво України" 2 вересня 1991, <https://zakon2.rada.gov.ua/laws/show/1543-12>, Letter to the Secretary-General of the United Nations from the President of the Russian Federation, 24 December 1991, <https://web.archive.org/web/20031123143520/http://www.iaea.org/Publications/Documents/Infcircs/Others/inf397.shtml>

the Agreement on the Ukrainian – Russian State Border and the Agreement on Cooperation in the Use of the Sea of Azov and the Kerch Strait (hereinafter the “2003 Agreements”) – are legal and valid.

Having established that the Sea of Azov qualifies as the internal waters of Ukraine and the Russian Federation, it should be concluded that the Kerch Strait which connects an exclusive economic zone on the Black Sea with the internal waters on the Sea of Azov does not satisfy the geographical criterion required under UNCLOS and the right of transit passage is not applicable in such strait. Neither the right of innocent passage is applicable in this strait since the strait itself is part of internal waters of Ukraine and Russian Federation under the 2003 Agreements.

With the exception of Articles 8(2) and 125 of UNCLOS third states do not enjoy any navigational rights in the internal waters of the coastal states. Thus, Ukraine cannot invoke any provisions of UNCLOS (which would not be related to land sovereignty issues) in arguing that it was unlawfully denied passage through the Kerch Strait. Nevertheless, rules of navigation within the Kerch Strait have been agreed between the states in the 2003 Agreement on Cooperation in the Use of the Sea of Azov and the Kerch Strait (hereinafter referred to as the “2003 Cooperation Agreement”) which will be analyzed in detail below.

#### *Rights under the 2003 Cooperation Agreement*

Article 2(1) of the Cooperation Agreement establishes that merchant ships, warships and other government ships operated for non-commercial purposes flying the flags of the Russian Federation or Ukraine enjoy freedom of navigation in the Sea of Azov and the Kerch Strait. Under Article 2(2) merchant ships of third states are entitled to access the Sea of Azov and to transit the Kerch Strait if they are proceeding to Russian or Ukrainian port or are returning from it. Article 2(3) provides that warships and government ships of third states operated for non-commercial purposes may access the Sea of Azov and to transit the Kerch Strait only if they are calling at a port of one of the signatory states upon its invitation or permission agreed with the other state.

Article 3 of the 2003 Cooperation Agreement states that Russian-Ukrainian cooperation in the spheres of navigation, including its regulation and navigational – hydrographic servicing, fishing, protection of marine environment, search-and-rescue in the Sea of Azov and the Kerch Strait shall be implemented by performing the existing agreements as well as concluding the new ones.

Ukraine and the Russian Federation sought to delimit their waters within the Sea of Azov and the Kerch Strait. Many suggestions were made by both sides throughout the more than 20 rounds of negotiations<sup>1</sup>, however, no agreement was achieved. The states have neither concluded any agreement which would regulate specifics of navigation through the Kerch Strait. Therefore, the only applicable instrument in this case is the 2003 Cooperation Agreement. Unfortunately, the

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<sup>1</sup> Supra note 20, p. 223.

agreement itself is very laconic<sup>1</sup>, thus, might be open to different interpretations. For example, one state might maintain that freedom of navigation which is enjoyed in the Kerch Strait by the vessels of the signatory states may not be encumbered by requiring to obtain prior permission for passing through the strait while the other might argue that requirement to receive such permission is established for the purposes of safety of navigation within the strait and is compatible with freedom of navigation. Thus, for the purposes of establishing the exact scope of the parties' obligations under the 2003 Cooperation Agreement, it is necessary to refer to the interpretation rules established in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter referred to as the "Vienna Convention").

Article 31 of the Vienna Convention establishes that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Any subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation, has to be taken into account together with its context. Under Article 32 of the Vienna Convention supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, may be resorted to if required. Unfortunately, preparatory work of the 2003 Cooperation Agreement is not publicly available, therefore, will not be used in this article when interpreting the aforementioned agreement.

As it has been mentioned, Article 2(1) of the 2003 Cooperation Agreement guarantees "freedom of navigation" ("свобода судоходства" in Russian and "свобода судноплавства" in Ukrainian) for Ukrainian commercial and naval warships in the Kerch Strait. Now it is necessary to establish the ordinary meaning of this term, as required under the Vienna Convention on the Law of Treaties. The same term is used in UNCLOS – as we know all states enjoy freedom of navigation ("свобода судоходства" in Russian text of UNCLOS) on the high seas and the exclusive economic zones of third states. Freedom of navigation means that every state has the right to sail ships flying its flag in the aforementioned maritime zones and that such ships, save in exceptional cases expressly provided in UNCLOS, shall be subject to the exclusive jurisdiction of the flag state. Thus, based on the aforementioned, Article 2(1) of the Cooperation Agreement would seem to imply that the ships of each signatory state have the right to transit the Kerch Strait without being subject to the jurisdiction of another signatory state.

Now it is necessary to analyze any subsequent practice of the states in the application of the 2003 Cooperation Agreement. Before 2014, Kerch-Yenikalsky canal, which was the only waterway through Kerch Strait that could be navigable by large ships, used to be operated by Ukraine<sup>2</sup>. Therefore, navigation through the

<sup>1</sup> E.g. Vladimir Socor describes the norms of the 2003 Cooperation Agreement as creating „a potentially open-ended situation of „*ex lex*“ or legal void“. Please see further: Socor V., Azov Sea, Kerch Strait: Evolution of Their Purported Legal Status, <https://jamestown.org/program/azov-sea-kerch-strait-evolution-of-their-purported-legal-status-part-one/>

<sup>2</sup> Koval D., Schatz V. J. Ukraine v. Russia: Passage through Kerch Strait and the Sea of Azov, <https://voelkerrechtsblog.org/ukraine-v-russia-passage-through-kerch-strait-and-the-sea-of-azov/>

Kerch Strait was subject to the procedures and rules approved by the Minister of Transport of Ukraine on 9 October 2002<sup>1</sup>. Thus, Ukraine would seem to be estopped from arguing that freedom of navigation guaranteed to its vessels under Article 2 of the 2003 Cooperation Agreement has been unlawfully encumbered by those formalities established in the Russian legislation<sup>2</sup> which in fact concur with the equivalent formalities that had been applicable under Ukrainian legislation.

However, when analyzing the events constituting the Kerch Incident, it has to be concluded that certain actions of the Russian Federation definitely constitute breach of Article 2 of the 2003 Cooperation Agreement. Unilateral suspension of the passage through the waters leading to the Kerch Strait for 2 days undeniably makes the freedom of navigation through the strait itself impossible and, therefore, definitely violates the 2003 Cooperation Agreement.

Thus, even if the 2003 Cooperation Agreement, based on the subsequent practice of the states, could be interpreted as permitting the state operating the Kerch-Yenikalsky canal to impose mandatory clearance for passage through the Kerch Strait, the fact that Ukrainian vessels did not wait for express clearance and decided to enter the strait should not be interpreted as an activity prejudicial to the peace, good order or security of the Russian Federation but as legitimate countermeasures taken against the state (i.e. the Russian Federation) which is responsible for an internationally wrongful act (i.e. violation of Article 2 of the 2003 Cooperation Agreement). Furthermore, even if there were no prior internationally wrongful act of the Russian Federation, it is highly doubtful whether the breach of formal requirements could result in the ultimate loss of freedom of navigation guaranteed by Article 2 of the 2003 Cooperation Agreement and the right of the Russian Federation to use force against Ukrainian ships.

Despite the fact that the Russian Federation has violated Article 2 of the 2003 Cooperation Agreement, Ukraine is not able to seek redress for this violation before an international court or tribunal. Article 4 of the 2003 Cooperation Agreement provides that “disputes between the States concerning interpretation and application of this Agreement shall be resolved through consultations and negotiations as well as other peaceful means chosen by the States”. Thus, the 2003 Cooperation Agreement does not establish a compulsory dispute settlement procedure. Such dispute can neither be resolved within the framework of UNCLOS since it is not the dispute concerning the interpretation or application of UNCLOS as required under its Article 279. Therefore, the only means available to Ukraine in this case are countermeasures and support of international community.

<sup>1</sup> Наказ Міністерства «Транспорту України Про затвердження Правил плавання суден Керч-Єнікальським каналом і підхідними каналами до нього від 09.10.2002 N 721», <http://zakon2.rada.gov.ua/laws/show/z0973-02/conv>

<sup>2</sup> Приказ Министерства Транспорта Российской Федерации от 21 октября 2015 года N 313 «Об утверждении Обязательных постановлений в морском порту Керчь», <http://docs.cntd.ru/document/420312576>

### ***Denunciation / Termination of the 2003 Cooperation Agreement***

As it is indicated in the Special Report “Russia’s Strategic Considerations on the Sea of Azov” prepared by the Warsaw Institute, “[f]rom the moment when Ukraine and Russia signed the 2003 Agreement on the Azov Sea, a number of opinions on its denunciation and some amendments to it have been voiced”<sup>1</sup>. On 22 February 2019 Ukrainian Foreign Minister Pavlo Klimkin announced that “in the foreseeable future, Ukraine is preparing to terminate the agreement with Russia on the Sea of Azov”<sup>2</sup>. Ukraine believes that upon termination of such agreement the Sea of Azov would result in having all the regular maritime zones while the Kerch Strait would qualify as the strait used for international navigation with the transit passage regime applicable therein. In such case all the disputes concerning navigation thought such strait could be resolved by referring them to compulsory dispute settlement procedures established under UNCLOS.

Under Article 60 of the Vienna Convention on the Law of Treaties a material breach of bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. In the opinion of Ukraine, since 2014 the Russian Federation has committed numerous breaches of the 2003 Cooperation Agreement: construction of the Kerch Bridge, limiting access of the ships to the Sea of Azov, excessive inspections of Ukrainian-flagged ships passing through the Kerch Strait and, finally, the actions of Russian Navy during the Kerch Incident.

However, despite the fact that Ukraine would be entitled under Article 60 of the Vienna Convention on the Law of Treaties to terminate the 2003 Cooperation Agreement, it is necessary to analyse whether Ukraine would strengthen its legal position upon such termination. Based on the reasoning of the Arbitral Tribunal in the Slovenia / Croatia Arbitration, it should be concluded that the Sea of Azov and the Kerch Strait would remain the internal waters of Ukraine and the Russian Federation despite termination of the 2003 Cooperation Agreement. As it has been already mentioned, legal status of the Bay of Piran after dissolution of the former Yugoslavia was predetermined not by the subsequent agreement of the bordering states but by the legal status of this bay within the former Yugoslavia. The Tribunal concluded that since the Bay of Piran was Yugoslav internal waters, dissolution, and the ensuing legal transfer of the rights of Yugoslavia to Croatia and Slovenia as successor States, did not have the effect of altering the acquired status and the bay remained to be the internal waters of Croatia and Slovenia even after dissolution of the former Yugoslavia.

If the Sea of Azov remains the internal waters of Ukraine and Russia even after termination of the 2003 Cooperation Agreement, the Kerch Strait will still be connecting the exclusive economic zone on the Black Sea with the internal

<sup>1</sup> Warsaw Institute. Special Report “Russia’s Strategic Considerations on the Sea of Azov” dated 3 December 2018, p. 34, <https://warsawinstitute.org/wp-content/uploads/2018/12/Russias-Strategic-Considerations-on-the-Sea-of-Azov-Warsaw-Institute-Special-Report.pdf>

<sup>2</sup> <https://uawire.org/klimkin-ukraine-is-ready-to-terminate-the-sea-of-azov-agreement-with-russia>



waters on the Sea of Azov. As it has been already mentioned, such straits do not enjoy any special status under the UNCLOS. Thus, even if Ukraine terminated the 2003 Cooperation Agreement, it would not strengthen its legal position since such termination would not result in the Kerch Strait becoming the strait used for international navigation with the transit passage regime applicable therein. Furthermore, in the Slovenia / Croatia Arbitration the Tribunal decided that there was no need for it to define any particular usage regime in the Bay of Piran different from what applies under international law. Regime applicable in the internal waters under international law is far more limited than the regime established in the 2003 Cooperation Agreement. Most likely if a tribunal or a court was requested to decide on the status of the Sea of Azov and the Kerch Strait upon termination of the 2003 Cooperation Agreement, it would establish a special regime applicable therein based on the practice of the bordering states before such termination. However, this special regime would not grant Ukraine any broader rights than the existing the 2003 Cooperation Agreement.

In conclusion, it is highly unlikely that Ukraine would benefit from termination of the 2003 Cooperation Agreement. Therefore, it is advisable to reconsider such intentions and to focus on alternative legal remedies that could be invoked by Ukraine in respect of Russia's actions during the Kerch Incident.

### ***Other violations of UNCLOS***

It is necessary to emphasize that not all of the events of the Kerch Incident took place in the Kerch Strait where 2003 Cooperation Agreement is applicable. Firstly, before the Ukrainian Navy vessels entered the Kerch Strait, the Russian Federation announced that navigation is suspended in the 12-mile zone preceding the Kerch Strait from 22:00 November 24 to 22:00 November 26. Secondly, the Ukraine Navy vessels were fired upon and captured not in the Kerch Strait itself, but in the 12-mile zone preceding the Kerch Strait or even further from the coast.

Even if this 12-mile zone preceding the Kerch Strait were the territorial sea of the Russian Federation, the actions of the Russian Federation would still qualify as violations of UNCLOS due to the following reasons.

According to Article 25(3) of UNCLOS, the “coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published”.

As it is indicated by Donald R. Rothwell, “[s]uch a right of temporary suspension <...> can only take effect after having been duly published thereby preventing ad hoc suspensions of passage”<sup>1</sup>. Haijiang Yang goes further to emphasize that “suspension has to be published in advance, otherwise it could not take effect. Publication

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<sup>1</sup> Rothwell D.R. UNCLOS Navigational Regimes and their Significance for the South China Sea in Wu S., Valencia M., Hong N. (eds.). UN Convention on the Law of the Sea and the South China Sea. Surrey: Ashgate Publishing Limited, 2015, p. 156.

through the public media available to mariners can be deemed “duly published”<sup>1</sup>. Even Article 12 of the Federal Act of the Russian Federation on the Internal Waters, Territorial Sea and Contiguous Zone of the Russian Federation provides that such suspension of innocent passage shall take effect only after it is published in advance in the “Notices to the Mariners”.<sup>2</sup>

As it is indicated by Ukraine, Ukrainian Navy vessels were informed by radio that the area before the Kerch Strait is closed for navigation from 22:00 November 24 to 22:00 November 26, however, Ukrainian Navy checked the database of the coordinator of the NAVAREA-III geographic area (SPAIN) as well as the NAVTEX notice which revealed no such official restrictions for passing through the Kerch Strait<sup>3</sup>. Furthermore, no such restrictions were announced in the Notices to the Mariners published by the Directorate of Navigation and Oceanography of the Russian Federation<sup>4</sup>. Thus, it should be concluded that suspension of innocent passage communicated by radio to the Ukrainian Navy vessels was aimed only at those vessels *per se* and does not constitute a legitimate suspension of the right of innocent passage under UNCLOS. Furthermore, some authors doubt whether the coastal state is entitled at all to exercise the right to suspend innocent passage through its territorial sea if such suspension has effect of cutting off access to another state's coast<sup>5</sup>.

In conclusion, discriminatory suspension of passage in the 12-mile zone preceding the Kerch Strait qualifies not only as the breach of the 2003 Cooperation Agreement, but of UNCLOS itself.

Legality of firing upon and capturing Ukrainian Navy vessels shall be examined next. As it has been established before, the fact that Ukrainian vessels did not wait for express clearance and decided to enter the strait should be interpreted as legitimate countermeasures taken against the state (i.e. the Russian Federation) which is responsible for an internationally wrongful act (i.e. violation of Article 2 of the 2003 Cooperation Agreement). Under Article 22 of the Articles on Responsibility of States for Internationally Wrongful Acts “[t]he wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if <...> that the act constitutes a countermeasure <...>”<sup>6</sup>. As a consequence, the fact that Ukrainian Navy vessels decided to proceed through the Kerch Strait without waiting for express clearance cannot be qualified as an activity prejudicial to the

<sup>1</sup> Yang H. Jurisdiction of the Coastal State over Foreign Merchant Ships in the Internal Waters and the Territorial Sea. Berlin: Springer, 2015, p. 221.

<sup>2</sup> Федеральный закон от 31 июля 1998 г. N 155-ФЗ «О внутренних морских водах, территориальном море и прилегающей зоне Российской Федерации» // <http://base.garant.ru/12112602/b6e02e45ca70d110df0019b9fe339c70/>

<sup>3</sup> <http://euromaidanpress.com/2018/12/07/ukraine-prosecutors-show-reconstruction-of-russian-attack-on-ukrainian-vessels-near-kerch-strait/>, [https://www.youtube.com/watch?v=JnU\\_F2LwHrI&feature=youtu.be](https://www.youtube.com/watch?v=JnU_F2LwHrI&feature=youtu.be)

<sup>4</sup> <https://structure.mil.ru/structure/forces/hydrographic/esim.htm>

<sup>5</sup> Alexander L. M. Navigational Restrictions within the New LOS Context. Leiden: Brill Nijhoff, 2017, p. 17.

<sup>6</sup> [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf)

peace, good order or security of the Russian Federation. If it does not qualify as an activity prejudicial to the peace, good order or security of the Russian Federation, then the Russian Federation cannot invoke Article 25 of UNCLOS and should be deemed in breach of Article 24 and 301 of UNCLOS.

Even if passage of Ukrainian Navy vessels was deemed to be prejudicial to the peace, good order or security of the Russian Federation, the use of force by the Russian Federation against Ukrainian Navy vessels was still unlawful under UNCLOS. Article 32 establishes that the warships and other government ships operated for non-commercial purposes of third states enjoy immunity in the territorial sea of a coastal state. Thus, the coastal state does not have any jurisdiction over such ships and can only demand that those warships which do not comply with the laws and regulations of the coastal state would leave its territorial sea, as established in Article 30 of UNCLOS<sup>1</sup>. It is true that it is unclear as to what actions a coastal state may take if the warship fails to obey the order<sup>2</sup>. As it is stated by James Kraska, “most scholars suggest that the lawful steps coastal states may take to require a foreign ship to leave the territorial sea do not include the use of force”<sup>3</sup>. However, there are some who argue that “[i]f the passage of a warship can be characterized as “non-innocent” and the coastal State requests it to leave its territorial sea, the coastal State may use minimum force to compel its departure”<sup>4</sup>. However, in case of Kerch Incident this discussion is irrelevant because military force was used by the Russian Federation against Ukrainian Navy Vessels at that time when they were already proceeding towards the outer limits of the 12-mile zone preceding the Kerch Strait, i.e. they were not disobeying the order to leave the territorial sea. Therefore, firing upon and capture of Ukrainian Navy vessels during the Kerch Incident violates Articles 30 and 32 of UNCLOS.

All of the violations of UNCLOS established in this subsection would seem to be a promising ground for the claim of Ukraine before an international court or tribunal since they are not related to land-sovereignty issues. Nevertheless, all of them might fall under the optional exception to applicability of section 2 of UNCLOS. Upon ratification of UNCLOS the Russian Federation has deposited a declaration stating that “[t]he Russian Federation declares that, in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning <...> military activities, including military activities by government vessels and aircraft <..>”<sup>5</sup>. It would be extremely difficult to deny that firing upon and capture of Ukrainian Navy vessels by the naval fleet

<sup>1</sup> Agyebeng W.K. *Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea*, Cornell International Law Journal Volume 39 Issue 2 (2006), p. 387.

<sup>2</sup> *Ibidem*.

<sup>3</sup> *Supra* note 8.

<sup>4</sup> Klein N. *Dispute Settlement in the UN Convention on the Law of the Sea*. Cambridge: Cambridge University Press, 2006, p. 298.

<sup>5</sup> [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm#Russian%20Federation%20Upon%20signature](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Russian%20Federation%20Upon%20signature)

of Russia does not qualify as “military activities” for the purposes of Article 298(1) (b) of UNCLOS.

There might be some room for different interpretation only in respect of suspension of innocent passage in the 12-mile zone preceding the Kerch Strait. Usually the right of innocent passage is suspended for the purposes of military exercises and this is clearly stated in the notifications on such suspension<sup>1</sup>. In such cases military activities exception is clearly applicable. However, the Russian Federation has failed to indicate any reasons for suspension of the passage in the 12-mile zone preceding the Kerch Strait. Furthermore, the suspension has not been duly notified. If the Russian Federation maintains that the passage was suspended since the tanker has run aground in the Kerch Strait, the military activities exception would not be applicable in this case. If it wants to resort to such exception it would have to admit that the suspension was specifically aimed at the Ukrainian Navy vessels which would make the suspension itself illegal. However, in such case validity of such suspension would fall outside the compulsory jurisdiction under UNCLOS due to applicability of military activities exception.

### ***Conclusions***

Since the Sea of Azov and the Kerch Strait falls within the internal waters of the Russian Federation and Ukraine, Ukraine cannot invoke any provisions of UNCLOS (which would not be related to land sovereignty issues) in arguing that it was unlawfully denied passage through the Kerch Strait. However, Ukraine and the Russian Federation have signed the 2003 Cooperation Agreement which establishes that the ships of signatory states enjoy freedom of navigation through the Kerch Strait. Analysis demonstrates that the Russian Federation has breached this agreement by unilaterally suspending for 2 days the passage through the waters leading to the Kerch Strait. Such suspension undeniably makes the freedom of navigation through the strait itself impossible and, therefore, violates the 2003 Cooperation Agreement. Unfortunately, Ukraine is not able to seek redress for this violation before an international court or tribunal since the 2003 Cooperation Agreement does not establish a compulsory dispute settlement procedure.

Intentions to terminate the 2003 Cooperation Agreement have been voiced by many Ukrainian politicians. Ukraine believes that upon termination of such agreement the Sea of Azov would result in having all the regular maritime zones while the Kerch Strait would qualify as the strait used for international navigation with the transit passage regime applicable therein. In such case all the disputes concerning navigation through such strait could be resolved by referring them to compulsory dispute settlement procedures established under UNCLOS. Referring to the Arbitral Award in the Slovenia / Croatia Arbitration, it has been demonstrated by this article that termination of the 2003 Cooperation Agreement would not change the status of the Kerch Strait and Ukraine would not strengthen its position upon such termination.

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<sup>1</sup> [http://www.un.org/Depts/los/convention\\_agreements/innocent\\_passages\\_suspension.htm](http://www.un.org/Depts/los/convention_agreements/innocent_passages_suspension.htm)

Finally, it has been emphasized that passage of the ships was discriminatorily suspended by the Russian Federation in the 12-mile zone preceding the Kerch Strait which qualifies not only as the breach of the 2003 Cooperation Agreement, but of UNCLOS itself. Furthermore, firing upon and capture of Ukrainian Navy vessels during the Kerch Incident violates Articles 30 and 32 of UNCLOS. Unfortunately, disputes concerning those violations seem to fall outside the scope of compulsory dispute settlement procedures under UNCLOS since the Russian Federation has declared that, “in accordance with article 298 of the United Nations Convention on the Law of the Sea, it does not accept the procedures, provided for in section 2 of Part XV of the Convention, entailing binding decisions with respect to disputes concerning <...> military activities”.

Thus, despite the fact that UNCLOS is being praised for its outstanding feature of compulsory dispute settlement procedures entailing binding decisions, it becomes clear that the exclusions to applicability of section 2 of UNCLOS, even limited, have a far reaching effect on the scope of the disputes that can be brought before international courts and tribunals. Ukraine should continue looking for violations of UNCLOS that would not be related with land sovereignty issues and would not be covered by the optional exceptions under Article 298 of UNCLOS. Meanwhile it should rely on the countermeasures and support of international community in invoking the sanctions against the Russian Federation.

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#### **Інцидент в Керченському проливі в світє Конвенції ООН по морському праву 1982 года**

*Стаття посвящена міжнародно-правовій оцінці інцидента в Керченському проливі, який мав місце 25 листопада 2018 г. В статті детально розглянуті наступні питання: описання подій, права навігації в Керченському проливі (права згідно Конвенції ООН по морському праву 1982 г., права згідно Договору між Україною і Російською Федерацією о співробітництві в використанні Азовського моря і Керченського проливу 2003 г.), можливість і наслідки денонсації (припинення) Договору 2003 г., порушення Конвенції ООН по морському праву 1982 г.*

**Ключевые слова:** Інцидент в Керченському проливі; внутрішні води; територіальне море; свобода судноходства; військові кораблі; Конвенція ООН по морському праву 1982 г.; Договір між Україною і Російською Федерацією о співробітництві в використанні Азовського моря і Керченського проливу 2003 г.

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